

**IN THE HIGH COURT OF PUNJAB AND HARYANA  
AT CHANDIGARH**

**Criminal Appeal No. 750-SB of 1999**

Date of decision: 8<sup>th</sup> February, 2010

Harun and another

... Appellants

Versus

State of Haryana

... Respondent

**CORAM: HON'BLE MR. JUSTICE KANWALJIT SINGH AHLUWALIA**

Present: Mr. Sudhir Sharma, Advocate for the appellants.  
Mr. Sunil Nehra, Senior Dy. Advocate General, Haryana  
for the State.

**KANWALJIT SINGH AHLUWALIA, J. (ORAL)**

Present appeal has been filed by Harun and Mubin, sons of Ishaq. They have been convicted by the Court of Additional Sessions Judge, Gurgaon vide judgment dated 17<sup>th</sup> July, 1999 for offence under Section 376 IPC and sentenced to undergo rigorous imprisonment for ten years and to pay fine of Rs.500/- each, in default of payment of fine to further undergo rigorous imprisonment for one month. The appellants were also convicted and sentenced under Section 323 IPC to undergo rigorous imprisonment for six months. They were further sentenced under Section 506 IPC to undergo rigorous imprisonment for one year.

In the present case, FIR Ex.PA was registered on the statement made by the prosecutrix PW-6. Name of the prosecutrix is withheld to protect her identity.

Prosecutrix stated to the police that on 19<sup>th</sup> January, 1994 at 10/11.30 a.m., she had gone to the fields for collecting mustard crop for

animals. When she was cutting the mustard crop, all of a sudden, Mubin took her in his embrace. Harun who was accompanying Mubin, gagged her mouth. Mubin got her laid in the mustard field forcibly, broke the string of her Salwar and committed rape forcibly. She tried her level best to get rid from the clutches of the accused, but Harun tied her on the ground by gagging her mouth. In the struggle her shirt was torn from both sides of the breast. Harun gave slaps and fist blows to her while she was lying on the ground and Mubin gave teeth bite on her right cheek. Her Salwar was thrown away on one side. After committing rape, the prosecutrix was also dragged on the mustard crop. She got multiple scratches. Thereafter, both the accused fled away from the spot. After wearing her Salwar, prosecutrix was coming to her house weeping when her parents met her and she narrated the whole incident to them. At that time, both the accused brothers arrived with Lathis and caused injuries to the parents of the prosecutrix.

The above said FIR was investigated and report under Section 173 Cr.P.C. was submitted. The case and the accused were committed to the Court of Sessions and trial was entrusted to the Court of Additional Sessions Judge, Gurgaon, who on 9<sup>th</sup> January, 1999, framed charge against the appellants under Section 323 read with section 34 IPC and section 506 read with section 34 IPC. Earlier thereto on 20<sup>th</sup> September, 1995, charge under Section 376 IPC read with section 34 IPC was framed against the present appellants.

Prosecutrix was medico legally examined by Dr.Santosh Jain PW-3. The observations and the injuries noticed by this doctor can be reproduced as under:

*“1. Swelling with bluish contusion left thigh of size 5 cm x 4 cm and size of swelling 5 x 4 cm at the let buttock. X-ray was advised. Kept under observation.*

2. Swelling of size 4 cm x 3 cm at the right cheek.  
The colour of swelling was bluish.

3. Swelling of size 3 cm x 2 cm at the left dorsal aspect of left hand.

Chest Examination:

No mark of injury was seen on the both breast.

Per Abdomen Examination:

No mark of injury was seen on both side of abdomen.

Veginal Examination:

External examination: Pubic hair were present. No support of semen was present.

2. Labia majora and minor were present. No mark of injury seen.

Internal Examination:

PV examination: two finger entered into the vaginal. Fresh bleeding PV examination. Utters size normal. Vaginal swabs were taken and handed over to the police. Kurta and Salwar were taken and handed over to the police.

Injury No.1 was kept under observation while No.2 and 3 were simple. They were in nature, caused by blunt weapon.”

In the swab sent to the Forensic Science Laboratory, no semen was found, therefore, the doctor found that no rape was committed.

Dr. Lal Singh PW-4 examined Mubin and stated that there was nothing to suggest that the accused was not capable of performing sexual intercourse. On 20<sup>th</sup> January, 1994 Juhri mother of the prosecutrix was also examined. There were abrasions on the right buttock region of size 4 x 10 cm. No bleeding was present. However, she complained of pain on right thigh, right leg, back of chest and thumb. All the injuries were declared simple. Father of the prosecutrix was also examined and three injuries were noticed on his person. Injury

No.1 was on the ring finger and little finger and was a blunt injury. Injuries No.2 and 3 were complaint of pain.

Prosecutrix appeared as PW-6. She reiterated what was stated in the FIR. In cross examination, this witness stated that she was married with Sahid and the marriage had taken place one year before the occurrence and her house was at a distance of 1 and ½ kos from the fields. In cross examination, this witness further stated that her Jholi was full of mustard when the accused had reached there. This witness was not able to tell the exact time when the rape was committed upon her. This witness stated that she was illiterate. Testimony of prosecutrix was corroborated by her mother Juhri PW-7.

Constable Dev Karan PW-1 had carried the special report to the Illaqua Magistrate. HC Mohinder Singh PW-2 tendered his affidavit Ex.PB and was not cross examined.

Sheodan Singh Patwari PW-5 proved scaled site plan Ex.PH. Ram Kishan SI PW-8 prepared report under Section 173 Cr.P.C. Ram Kishan constable PW-9 had carried sealed parcel to Forensic Science Laboratory, Madhuban. Pawan Kumar ASI PW-10 had recorded statement, on the basis of which, formal FIR was registered and he had carried the investigation. ASI Inder Singh PW-11 had formally recorded the FIR Ex.PA.

Thereafter, prosecution closed its evidence.

Statement of the accused was recorded under Section 313 Cr.P.C. They denied all the incriminating circumstances put to them. In his statement recorded under Section 313 Cr.P.C., Harun gave the following version:

*"I am innocent. On the day of occurrence, prosecutrix (name withheld) and her sister were stealing mustard from our field and when a protest was lodged by my mother*

*Rajni, beatings were given by them to my mother. My mother raised alarm and Hukumddin, Jakir and several other villagers reached at the spot in order to rescue my mother and the present case has been foisted upon me and my brother in order to save themselves from the occurrence in which my mother was given injuries by them. Prosecutrix (name withheld) was 26 years old at the time of occurrence.”*

Mubin also reiterated what was stated by Harun.

No witness was examined in defence.

Mr. Sudhir Sharma, Advocate appearing for the appellants, has stated that in the present case, both the appellant have been falsely implicated. The prosecutrix was stealing the mustard crop, she was reprimanded and injuries were caused to parents of the appellants. Therefore, out of enmity, allegation of rape has been leveled. Furthermore, it has been submitted that PW-3 Dr.Santosh Jain had given an opinion that since the report of Forensic Science Laboratory states that no semen was found on the swab, therefore, no rape had taken place. Thirdly, it has been submitted that Harun has not committed rape, therefore, he cannot be convicted for offence under Section 376 read with section 34 IPC. To fortify this submission, counsel has further stated that no charge was framed against the appellants under Section 376(2)(g) IPC, therefore, a prejudice has been caused to them.

After hearing counsel for the appellant, I am of the view that all the contentions raised before me are liable to be rejected. Prosecutrix had admitted that she had gone to take mustard crop for feeding the cattle. In her Jholi, there was mustard crop. The accused had not only felt offended but intended to teach her lesson also.

Therefore, the prosecutrix was raped. It is a typical crime perpetrated by landlord against the landless. Therefore, this argument cannot be accepted. When prosecutrix had stated that she was raped, presence of semen is only corroborative piece of evidence. Presence or absence of the semen will not obliterate the offence of rape. Medical Officer had noticed fresh bleeding from vagina. In the present case, right from the lodging of the FIR, submission of report under Section 173 Cr.P.C. and recording of the statement of the witnesses the role of the accused appellants was well described by the prosecution. They knew what they had done. Therefore, by mere error in framing of charge, no prejudice has been caused. Section 464 of Code of Criminal Procedure reads as under:

***“464. Effect of omission to frame, or absence of, or error in, charge.--(1) No finding sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of Justice has in fact been occasioned thereby.***

*(2) If the Court of appeal, confirmation or revision, is of opinion that a failure of justice has in fact been occasioned, it may --*

*(a) in the case of an omission to frame a charge, order that a charge be framed, and that the trial be recommended from the point immediately after the framing of the charge;*

*(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:*

*Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.”*

It was held by a Constitutional Bench of Hon'ble Apex Court in '**Willie (William) Slaney v. State of Madhya Pradesh**' AIR 1956 SC 116 that omission to frame a separate charge is a curable irregularity and will not vitiate the trial. Right from the beginning, accused were aware that both of them had participated in the crime. Therefore, the judgment of Single Bench of this Court rendered in '**Rajeev and another v. State of Haryana**' Criminal Appeal No.749-SB of 2008 decided on 16<sup>th</sup> November, 2008 cannot be taken into consideration, as it has not noticed the ratio of law laid by the Constitutional Bench of Hon'ble Apex Court in Willie Slaney's case (supra). Similarly, '**Bala Seetharamaiah v. Perike S. Rao and others**' AIR 2004 Supreme Court 2172 has also not noticed the ratio of law laid in Willie Slaney's case (supra).

Counsel for the appellants has tried to distinguish the case of Harun by raising contention that Harun, who had not raped the prosecutrix, cannot be convicted. Reliance has been placed upon '**Pardeep Kumar v. Union Administration, Chandigarh**' 2006(10) Supreme Court Cases 608.

The judgment relied is also distinguishable. In Pardeep Kumar's case (supra), it was held that the appellant had reached after the offence was committed. In the present case, Harun had participated

from the very beginning. He had gagged the mouth of prosecutrix. He had facilitated the offence of rape. Therefore, the case will fall under Section 376(2)(g) IPC. Thus, his conviction is also maintained.

No interference in the sentence awarded to the appellants is warranted and the present appeal is dismissed.

**[KANWALJIT SINGH AHLUWALIA]  
JUDGE**

**February 8, 2010**

*rps*